No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, *ET AL.*,

Petitioners,

v.

STATE OF NEW YORK, *ET AL.*,

Respondents.

On Writ of Certiorari before Judgment to the U.S. Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

2. Whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker – including by compelling the testimony of high-ranking Executive Branch officials – without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

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INTEREST OF *AMICUS CURIAE*

Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty-five years, EFELDF has consistently defended the Constitution's federalist structure and the separation of powers. In the context of the integrity of the elections on which the Nation has based its political community, EFELDF has supported efforts to ensure equality of voters

[1] *Amicus* files this brief with the written consent of all parties. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to the preparation or submission of this brief.

consistent with the written Constitution and validly enacted laws. For the foregoing reasons, *amicus* EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

In the consolidated actions before the United States District Court for the Southern District of New York, the various plaintiffs-respondents (collectively, "Plaintiffs") claim that including a citizenship question on the 2020 census will injure them because their jurisdictions include large populations of Hispanics or illegal aliens, whom the question will disproportionately discourage from responding to the census. The defendants-petitioners (collectively, "Commerce") are the federal Department of Commerce, its Secretary Wilbur L. Ross, Jr., in his official capacity, the federal Census Bureau, and its Director, in his official capacity.

Commerce plans to use the citizenship question in conducting the 2020 census pursuant to the Constitution's Census Clause, U.S. CONST. art. I, §2, cl. 3, and the implementing legislation. As Commerce explains, the decennial census has included birthplace and citizenship questions for most of the Nation's history, although the most recent versions of the census sought that information through smaller samples and surveys. Pet. App. at 550a. With respect to reinstating the citizenship question, the record shows that block-level data for citizen voting-age population ("CVAP") would aid the Department of Justice ("DOJ") in its enforcement of the Voting Rights Act, 52 U.S.C. §§10301-10314 ("VRA"). Pet. App. 550a-551a, 564a-569a.

For the 2020 census, Commerce considered four options for obtaining citizenship data:

- ***Option A (2010 "status quo")***: Use the American Community Survey ("ACS") exclusively, as the 2010 census had done for the first time, with neither a census question nor administrative records.
- ***Option B (citizenship question)***: Reinstate a citizenship question on the census questionnaire.
- ***Option C (administrative records)***: Use data from other sources – *i.e.*, "administrative records") to provide citizenship data without a question on the census questionnaire.[2]
- ***Option D (Options B and C combined)***: Use a combination of Options B and C to both reinstate a citizenship question and to supplement and evaluate that data with administrative records.

Commerce selected Option D and supported its choice with a memorandum by Secretary Ross, Pet. App. 548a-563a, which – in turn – relies on an extensive administrative record. *See id.* 549a. Among the key facts and factors underlying that decision were that administrative records exist to show the citizenship of approximately 88 percent of the population, so that an administrative-record-only approach cannot alone meet the need for citizenship data. *Id.* 555a.

Judicial review under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), normally

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[2] "Administrative records" (plural) are the data that 13 U.S.C. §6(c) directs Commerce to use in lieu of direct inquiries on the census, and the "administrative record" (singular) is the record on which Commerce acted in approving the citizenship question for 2020.

proceeds on the agency's administrative record, 5 U.S.C. §706, but here the district court granted Plaintiffs' motion for extra-record discovery – including depositions of high-ranking officials – by orders dated July 3, 2018, August 17, 2018, and September 21, 2018. This Court stayed one of the depositions, *In re Dep't of Commerce*, 139 S.Ct. 16 (2018), but allowed other extra-record discovery to go ahead. After a bench trial, the district court held that the citizenship question would cause a differential decrease in Hispanic and non-citizen response rates and that Commerce's adoption of the citizenship question violated the APA as arbitrary, capricious, and not in accordance with the Census Act, 13 U.S.C. §§1-402.

SUMMARY OF ARGUMENT

Plaintiffs lack an Article III case or controversy because their purported injury is not only too speculative for standing (Section I.A), but also is the result of illegal conduct, 13 U.S.C. §221(a), which breaks the causal link to Commerce's action (Section I.B). In addition to these defects that apply to each plaintiff's standing, this Court also should reject two other significant errors regarding standing. First, the district court repeats a prevalent practice of using a plaintiff's diverted resources to address government action as a basis for standing. This rationale relies on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982), which involved a statute entirely different from the Census Act at issue here. Without the specifics of the *Havens Realty* statute – *viz*, a statutory elimination of prudential standing and a statutory right to accurate information coupled with a

cause of action – diverted resources are self-inflicted injuries that cannot provide standing to sue the government (Section I.C). Relatedly, in a novel turn, the district court finds the informational right to obtain information includes a further right to dispute how the information is designed, which is simply unprecedented (Section I.D).

With respect to the standard of review, the APA's arbitrary-and-capricious test equates to the rational-basis test, except that the APA confines the former to the administrative record, whereas the latter weighs not only the government's basis for acting but also any basis on which it plausibly *might have* acted (Section II.A). In addition, because judicial review is confined to the administrative record, that review does not include a balancing of harms versus benefits or an inquiry into agency motives; going outside that record requires a showing of bad faith that is not met here (Section II.B). Under the circumstances, then, the extra-record information that Plaintiffs and the district court obtained is irrelevant (Section II.C).

On the merits, the district court's findings of Census Act violations and arbitrary and capricious action under the APA all are wrong. First, Commerce complied with 13 U.S.C. §6(c) by justifying its choice to use a combination of administrative records and direct inquiry to supply citizenship data (Section III.A.1). Second, the congressional reporting requirements of 13 U.S.C. §141(f) arguably were met, but certainly are for Congress – not private litigants or courts – to enforce (Section III.A.2).

The APA analysis fares no better. First, the district court was wrong to find Commerce's analysis

arbitrary based on guidance from the Census Bureau ("Census") and from the Office of Information and Regulatory Affairs ("OIRA") and the Office of Management and Budget ("OMB") under Paperwork Reduction Act, 44 U.S.C. §§3501-3521 ("PRA"). Those sub-regulatory guidance documents do not bind agencies, and they would have required notice-and-comment rulemaking if they did bind agencies' discretion. Instead, the guidance documents are merely tools for intra-Executive-Branch coordination and analysis, with no private rights created for courts to enforce (Section III.B.1). Data quality and alleged pretexts aside, the district court's analysis does not render Commerce's proffered VRA rationale sufficiently disconnected from Commerce's decision to ask a direct citizenship question while also supplementing that data with administrative records (Section III.B.2). Finally, the district court's belief that Commerce added the citizenship question based on an undisclosed ulterior motive – if true – would nonetheless be irrelevant because the arbitrary-and-capricious standard tests whether the proffered basis was rational, not some unknown "real" rationale: in other words, the APA does not prohibit pretextual actions if the proffered basis supports the action (Section III.B.3).

ARGUMENT

I. THE COURTS BELOW LACKED SUBJECT-MATTER JURISDICTION TO ENTERTAIN PLAINTIFFS' SUIT.

Before reaching the merits, this Court first must establish the district court's jurisdiction. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 95 (1998).

Indeed, under *Steel Company*, this Court has the *obligation* – not the mere discretionary power – to resolve threshold jurisdictional issues:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co., 523 U.S. at 95 (interior quotations, citations, and alterations omitted). That obligation compels dismissal for lack of an Article III case or controversy.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). To have standing, a plaintiff must show that it "has sustained or is immediately in danger of sustaining some direct injury" from the challenged action, and that injury must be "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)

(interior quotations omitted). As explained below, Plaintiffs' case suffers from several fatal Article III flaws.

A. Plaintiffs' fears of an undercount are too speculative to support standing.

It remains speculative whether using Option D on the 2020 census will cause the differential undercount that Plaintiffs allege would cause their concrete Article III injuries (*e.g.*, loss of representation or funding). To have standing "to challenge the operation of the ... census-taking machinery ... [a plaintiff] must show at least a substantial likelihood that the relief which he seeks will result in some benefit to himself." *Sharrow v. Brown*, 447 F.2d 94, 96-97 (2d Cir. 1971). Insofar as federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), that alone would suffice to vacate the district court's order for lack of Article III standing.

The record reflects two types of undercount potentially caused by a new citizenship question: distrust of government and increased burden. Only the former triggers differential nonresponse rates for Hispanics and noncitizens. Pet. App. 557a. As Secretary Ross explained, however, interest groups consistently attack the census and discourage census participation, even without a citizenship question. *Id.* 558a-559a. While the district court found that the rate would be *even higher* with a citizenship question, the district court also acknowledged that the best way to

avoid getting caught in Commerce's follow-up efforts was to avoid responding to the census. Pet. App. 9a, 164a-165a, 185a (Census's "[non-response follow up] operations may actually make the problem worse"). The district court's facile and static analysis of Option C failed to consider the impact on nonresponse rates when Hispanics and noncitizens learn that Commerce would assess all census respondents' citizenship administratively. In that scenario (Option C), Secretary Ross was correct to find it "likely [that] efforts to undermine the decennial census will occur again regardless of whether the decennial census includes a citizenship question." *Id.* 558a-559a. The district court erred in under-evaluating Option C's negative impact on Hispanic and noncitizen response rates.

In addition, it remains possible that Commerce can impute the citizenship of residents who fail to respond to the census, thus avoiding any harm from a differential undercount. For injuries such as intra-state representation or funding, any entity that remains free to cure the differential effect of a census undercount would be an independent third-party cause of any injuries to Plaintiffs. *Young v. Klutznick*, 652 F.2d 617, 624-25 (6th Cir. 1981) (holding state legislature – not Census – responsible for decrease in representation in state legislature because legislature could have corrected for census undercount). Thus, even if the feared undercount actually happens, that undercount might not impact Plaintiffs.

In sum, Plaintiffs bear the burden of proving their standing, and they cannot show that the differential nonresponse rate for Hispanics and noncitizens would

be higher under Option D versus Option C or that Census will be unable to correctly impute citizenship.

B. Projected third-party crimes – such as not answering the census or answering it falsely – break the causal chain in Plaintiffs' standing.

Even worse than Plaintiffs' evidentiary failure to show the required actual and imminent injury, *Lyons*, 461 U.S. at 102, Plaintiffs' entire premise rests on the claim that illegal aliens will elude responding to the Census, in violation of federal law. 13 U.S.C. §221(a). The offense by third-party illegal aliens breaks the causal chain in Plaintiffs' theory of injury: "a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Plaintiffs cannot rest their standing on third parties' unlawful actions or inactions.

The district court attempts to put Commerce within the causal chain, notwithstanding third-party actions: "Even in a dry season, it is fair to trace the fire to the arsonist." Pet. App. 232a. If an environment of mistrust against government is the dry season, that does not make Commerce the arsonist. The arsonists are those who criminally fail to respond to the census. To use another of the district court's examples, Commerce is not the court clerk who breaches a duty of privacy by publishing a Social Security Number as part of a traffic citation. *Lambert v. Hartman*, 517 F.3d 433, 437-38 (6th Cir. 2008) (cited at Pet. App. 237a). Commerce is like the agency that blamelessly

created Social Security Numbers in the first place. Despite the district court's suggestion otherwise, not every domino relates sufficiently to the last domino's fall to count within a causal chain. Pet. App. 238a. Commerce did not cause the injuries of which Plaintiffs complain.[3]

Given that we deal here with *noncitizens*, "[t]o afford controlling weight to such impressions... is essentially to subject a duly enacted statute to an international heckler's veto." *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting).[4] Although *amicus* EFELDF does not agree with all of the rights that this Court has afforded illegal aliens under the Equal Protection Clause or otherwise, this Court has never held that illegal aliens have a "heckler's veto" over the United States' ability to collect required citizen-related information. *See* U.S. CONST. art. I, §2, cl. 3; *cf. Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997). This Court should not read the Constitution or federal law to create an implied right for illegal aliens to come here illegally, to thwart the Census illegally, and thereby to support injunctive relief against the federal sovereign.

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[3] As explained in Section I.A, *supra*, to the extent that injury flows from a third parties' use of census data that the third party could have adjusted for any dispropionate undercount, that third party – not Commerce – would be the party causing Plaintiffs' injury. *Young*, 652 F.2d at 624-25 (holding state legislature – not Census – responsible for decreased representation in state legislature).

[4] The district court and Census staff refer to the heckler's veto issue as changes in the "macroenvironment" in which the census takes place. Pet. App. 106a, 143a, 150a, 155a, 189a, 231a-232a.

C. Institutional plaintiffs cannot establish standing through the self-inflicted injury of diverting their own resources.

The district court found that several institutional plaintiffs had standing based on the resources that they choose to divert to address Commerce's action. Pet. App. 187a-194a. But for *Havens Realty*, these injuries would easily qualify as self-inflicted injuries not caused by the challenged agency action. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). This Court should take the opportunity to clarify and narrow *Havens Realty* to its context.

If mere spending could manufacture standing, any private advocacy organization could establish standing against any government action. But that clearly is not the law. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"). The disconnect arises from atypical aspects of the *Havens Realty* statute, which authorized suit by anyone, without regard to whether the person was "aggrieved" by the violation of the underlying statute.

Relying on *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-09 (1979), *Havens Realty* held that the Fair Housing Act extends "standing under § 812 ... to the full limits of Art. III," so that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," 455 U.S. at 372, thereby collapsing the standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The

typical organizational plaintiff and typical statute lack several critical criteria from *Havens Realty*.

First, the *Havens Realty* plaintiff organization had a statutory right (backed by a statutory cause of action) to truthful information that the *Havens Realty* defendants denied to it. Because "Congress may create a statutory right," "the alleged deprivation of [those rights] can confer standing." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). Under a typical statute, a typical organizational plaintiff has no claim to any rights related to its own voluntarily diverted resources.

Second, and related to the first issue, the injury that an organizational plaintiff claims must align with the other components of its standing, *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), including the allegedly cognizable right. In *Havens Realty*, the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). By contrast, under a typical statute, there will be no rights even *remotely* related to a third-party organization's spending.

Third, and most critically, the statute in *Havens Realty* eliminated prudential standing, so the zone-of-interest test did not apply. When a plaintiff – whether individual or organizational – sues under a statute that does not eliminate prudential standing, that plaintiff cannot bypass the zone-of-interest test or other prudential limits on standing. Normally, it would be fanciful to suggest that a statute has private,

third-party spending in its zone of interests. Here, nothing in the Census Act or the Constitution comes close to suggesting that Plaintiffs' spending was of any interest to Congress or the Framers.

D. Informational standing does not include a right to second-guess agencies' information.

Citing a hypothetical relaxation of immigration data by federal authorities, the district court suggests that informational standing (*i.e.*, information access) includes the ability to review information quality. Pet. App. 184a-187a. This Court's informational-standing cases stand for the unobjectionable proposition that one with a statutory or constitutional right to information suffers an "injury in fact" from the denial of access to the information. *See Fed'l Election Comm'n v. Akins*, 524 U. S. 11, 19-20 (1998) (denial of statutorily required information qualifies as concrete injury under Article III). That is very different from the district court's expansive – indeed, explosive – concept of informational standing.

Like the Freedom of Information Act, 5 U.S.C. §552 ("FOIA"), informational standing "deals with 'agency records,' not information in the abstract." *Forsham v. Harris*, 445 U.S. 169, 185 (1980). And like FOIA, informational standing provides *access* to records to which the public has a constitutional or statutory right: it does not require governmental defendants to *create* records, much less provide plaintiffs or reviewing courts a basis to second-guess and *edit* the documents that an agency created:

> The Act does not compel agencies to write opinions in cases in which they would not

> otherwise be required to do so. It only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. Thus, insofar as the order of the court below requires the agency to create explanatory material, it is baseless.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-62 (1975) (citations omitted). To the extent that the order below requires Commerce to create different Census material, purely based on the right of access, the order is worse than baseless.

The district judge and Plaintiffs bear out Judge Posner's colorful assessment that the "main contemporary reason[s] for having rules of standing" include "minimizing .... judicial interference with the life of the nation" and "prevent[ing] kibitzers, bureaucrats, publicity seekers, and 'cause' mongers from wresting control of litigation from the people directly affected." *Illinois DOT v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997). If informational standing gives a reviewing court the power to compel agencies to *rewrite* agency action to suit a litigant or judge, representative government will cease to exist.

II. THE DISTRICT COURT MISAPPLIED THE STANDARDS OF REVIEW.

Assuming *arguendo* that federal jurisdiction were present, this Court would then face the two questions presented: (1) the APA merits, and (2) the district court's supplementing the administrative record. The second question – related to the scope of review – comes first analytically. This section addresses that

question, as well as the standard of review that should apply to APA actions.

A. The arbitrary-and-capricious test has the same stringency as rational-basis review.

Leaving aside the possibility that APA arbitrary-and-capricious review requires *less* than a rational basis, this Court has already held that it requires *no more*: "we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974). Congress ratified this view by amending the APA in 1976, while leaving that issue unchanged. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). So, while "[t]he standard of review – rational basis or arbitrary and capricious – is determined by statute," *Chemung Cty. v. Dole*, 781 F.2d 963, 971 (2d Cir. 1986) (*citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)), remarkably little hangs on which test applies.

Given that the APA's arbitrary-and-capricious test requires no more than the rational-basis test as far as stringency is concerned, *Bowman Transp.*, 419 U.S. at 290, the only real difference is the one set by the APA's (and administrative law's) focus on the administrative record on which the agency acted. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (reviewing courts limit agencies to the "the basis articulated by the agency

itself" in the record) ("*MVMA*"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (same, pre-APA). Rational-basis review, by contrast, considers any conceivable basis on which the government hypothetically *may have* acted. *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). But, other than the APA's limiting agency defendants to their records, the two analyses are the same.

The arbitrary-and-capricious and rational-basis tests do not weigh benefits versus harms. Unlike heightened scrutiny,[5] this mode of review does not require narrowly tailoring policies to legitimate purposes: "[rational basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), and a policy "does not offend the Constitution simply because the classification is not made with mathematical nicety or because *in practice it results in some inequality.*" *Id.* at 316 n.7 (interior quotations omitted, emphasis added). In the absence of an express mandate in an underlying substantive statute, the APA does not require agencies to balance benefits versus harms (*e.g.*, the value for enforcing the Voting Rights Act versus the alleged negative effect that asking about citizenship might have on response rates):

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[5] Arbitrary-and-capricious review does not include a "sliding scale" for evaluating certain rights or statutes over others. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009) ("[i]f they mean to invite us to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties, we reject the invitation").

> Nor does [the petitioner] cite to any authority – and we are aware of none – for the proposition that the APA's arbitrary and capricious standard alone requires an agency to engage in cost-benefit analysis.

Village of Barrington v. Surface Transp. Bd., 636 F.3d 650, 670-71 (D.C. Cir. 2011) (Tatel, J.). APA review provides no room for judges or plaintiffs to force their alternate policy views and preferences on agencies or the public.

Instead, to prevail under this standard of review, Plaintiffs must do much more than put together "impressive supporting evidence ... [on] the probable consequences" vis-à-vis the legislative purpose; they instead must negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original); *Beach Comm.*, 508 U.S. at 315 ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). As applied here, Plaintiffs would need to prove that the citizenship data are *irrelevant* to enforcing the Voting Rights Act, something that they do not even attempt to do. The district judge had no basis in the record to second guess Commerce.[6]

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[6] Instead of attempting to negative Commerce's stated rationale, Plaintiffs and the district judge essentially assert that their preferred policies are better than the policy goals that Commerce rationally advances. Judicial review under the rational-basis test does not afford them that privilege. *See* Section III.B.2, *infra*.

B. Neither Plaintiffs nor the district court met the high bar for discovery outside the administrative record.

Plaintiffs did not establish the bad faith required for high-level depositions in this context, and the personal mental processes of agency actors are irrelevant.

Assuming *arguendo* that an agency action is not *ultra vires*, a court must uphold the agency action if a rational basis in the record supports the action (*i.e.*, if the action is neither arbitrary nor capricious). In making that determination, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Deposing high-ranking officials to go outside the administrative record requires "a strong showing of bad faith or improper behavior," *Overton Park*, 401 U.S. at 420, which Plaintiffs failed to make. Under the circumstances, *any* extra-record evidence is – by definition – irrelevant.

In any APA action for judicial review of agency action, the question is most decidedly not a judge's view of the wisdom of the agency's choice of actions from among the slate of possible rational action:

> Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978). Commerce has identified a rational basis for its action, *see* Section

III.B.2, *infra*, which is all that APA review requires here. This Court should forcefully reject judicial usurpation of executive power under the guise of judicial review.

C. Personal mental processes would be irrelevant.

"It was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions," *Morgan v. U.S.*, 304 U.S. 1, 18 (1938); *accord U.S. v. Morgan*, 313 U.S. 409, 422 (1941), because the administrative record here suffices. 5 U.S.C. §706 ("the court shall review the whole record or those parts of it cited by a party"); *MVMA*, 463 U.S. at 50; *Chenery*, 332 U.S. at 196. Indeed, "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). Congress codified administrative review to rely *on the record* before an agency. 5 U.S.C. §706. Because the extra-record hunt for ulterior motivations is irrelevant, the hunt should not have taken place.

III. COMMERCE PERMISSIBLY ADDED THE CITIZENSHIP QUESTION TO THE 2020 CENSUS.

No statutory or constitutional provision directly precludes including a citizenship question on the census, so – to prevail – Plaintiffs must show that adding the question was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with" some generally applicable law. 5 U.S.C.

§706(2)(A). As explained in this section, Plaintiffs cannot make that showing.

A. Commerce acted "in accordance with the law."

The district court held that adding the citizenship question violated both §6(c) and §141(f) of the Census Act. Both holdings are wrong.

1. Adding the citizenship question did not violate §6(c).

The district court found that Commerce violated §6(c) of the Census Act by failing to use administrative records to determine citizenship "[t]o the maximum extent possible." *Compare* 13 U.S.C. §6(c) *with* Pet. App. 262a-272a. In making that finding, the district court did not dispute Commerce's finding that administrative records are unavailable to answer the citizenship question for approximately 11.4 percent of the population. Pet. App. 555a. In other words, it is simply not possible to obtain a complete citizenship data set using administrative records. As explained below, the district court misread or misapplied §6(c) for at least two reasons.

The district court assiduously ignores the balance of §6(c), which limits that subsection as to "the kind, timeliness, quality and scope of the statistics required." 13 U.S.C. §6(c). Courts must read statutes to avoid interpreting phrases as mere surplusage, *Maracich v. Spears*, 570 U.S. 48, 68-70 (2013), which the district court did not do. The ignored language contemplates not only the unavailability of complete administrative records, but also other facets of data – such as citizenship data – that have long been part of the census.

Specifically, with respect to basic questions such as sex, age, and citizenship that have appeared on the census both before and after the 1976 amendments that added §6(c),[7] Congress may not have intended to preclude Commerce's continuing to ask such standard questions. Alternatively but relatedly, Congress has amended the Census Act several times since 1976,[8] which suggests that Congress has ratified the implicit understanding that these historic questions fall within the "kind, timeliness, quality and scope of ... statistics" that §6(c) allows Commerce to obtain via direct inquiry on the census: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard*, 434 U.S. at 580. While Congress may not have intended §6(c) to preclude a citizenship (or sex or age) question in the first instance, Congress would have ratified Commerce's limiting construction by now, regardless of what Congress intended in 1976.

2. Commerce did not violate §141(f) in adding the citizenship question.

The district court found that Commerce violated §141(f) of the Census Act by failing to submit the required reports to Congress to apprise the congressional committees with jurisdiction over the

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[7] PUB. L. NO. 94-521, §5(a), 90 Stat. 2459, 2460 (1976).

[8] PUB. L. NO. 96-52, §1(a), 93 Stat. 358 (1979); PUB. L. NO. 101-533, §5(b)(2), 104 Stat. 2344, 2348 (1990); PUB. L. NO. 103-430, §2(a)-(b), 108 Stat. 4393, 4393-94 (1994); PUB. L. NO. 105-113, §4(a)(1), 111 Stat. 2274, 2276 (1997); PUB. L. NO. 105-119, tit. II, §210(k), 111 Stat. 2440, 2487 (1997); PUB. L. NO. 108-178, §4(c), 117 Stat. 2637, 2641 (2003).

census of Commerce's plans. *Compare* 13 U.S.C. §141(f) *with* Pet. App. 272a-284a. The district court considers this a close question, *id.* 284a, but it is not. Reporting requirements like §141(f) are not justiciable by Article III courts and create no rights for private parties to enforce. *NRDC v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988); *Taylor Bay Protective Assoc. v. Adm'r, United States Envtl. Prot. Agency*, 884 F.2d 1073, 1080-81 (8th Cir. 1989); *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998). Congress can enforce these requirements if it finds them violated, and it is entirely possible that Congress viewed the timely report that Commerce filed under §141(f)(2) as meeting the curative requirements of §141(f)(3). In sum, it is not clear whether Commerce violated §141(f) at all, but it is clear that that decision is up to Congress both to decide and to enforce.

B. Commerce did not act arbitrarily or capriciously.

The district court held that adding the citizenship question violated the APA's arbitrary-and-capricious standard on various bases: a "veritable smorgasbord of classic, clear-cut APA violations." Pet. App. 10a. In each case, however, Commerce's action complied with the APA.

1. The district court erred in relying on OMB and Census guidance.

The district court cited Commerce's departure from OMB and Census guidance issued by the prior administration as evidence of the arbitrariness and capriciousness of adding the citizenship question. As this Court recently explained, "federal judges are appointed for life, not for eternity." *Yovino v. Rizo*, No.

18-272, 2019 U.S. LEXIS 1354, at *6 (Feb. 25, 2019). The Constitution provides even more limited terms of office to presidents and members of Congress. U.S. CONST. art. I, §§2-3; *id.* art. II, §1. Federal law also sets the procedure that a president or Congress – as well as agencies working under a president – must follow when they want their handiwork to live on, past their respective terms in office. *Id.* art. I, §7, cl. 2-3 (bicameralism and presentment); 5 U.S.C. §553(b) (notice-and-comment rulemaking). Neither the OMB nor Census guidance qualifies as a regulation, and – as sub-regulatory guidance – these documents could not bind future agency discretion without notice-and-comment rulemaking. *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918 (D.C. Cir. 1982). Sub-regulatory agency guidance does not bind future – or even *present* – administrations, which is why agencies can issue them without using APA rulemakings.[9]

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[9] The district court considered the Census guidance "the product of a formal rule-making-type process," Pet. App. 309a (*citing* 67 Fed. Reg. 38467 (2002)), which is not a valid APA category. The cited Federal Register notice merely announced draft guidance and invited public comment. Taking public comment on draft guidance does not elevate the process into notice-and-comment rulemaking. For example, the agency did not *respond* to comments or issue the new rule with a future effective date. *See* 5 U.S.C. §553(c), (d). Providing notice of and taking comment on guidance does not satisfy the APA's notice-and-comment requirements. *Nat'l Tour Brokers Ass'n v. U.S.*, 591 F.2d 896, 899 & nn.8-10 (D.C. Cir. 1978); *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) ("agency may not introduce a proposed rule in [the] crabwise fashion" of discussing the issue in a *Federal Register* preamble).

OMB issued the Statistical Policy Directive as a notice, citing its authority as 44 U.S.C. §3504(e) and 31 U.S.C. §1104(d). *See* 79 Fed. Reg. 71,610 (2014). Under the PRA, the OMB Director has authority not only to "develop and oversee the implementation of Governmentwide policies, principles, standards, and guidelines concerning" the collection of statistics but also to "evaluate statistical program performance and agency compliance with Governmentwide policies, principles, standards and guidelines." 44 U.S.C. §3504(e)(3)-(4). Under 31 U.S.C. §1104(d), the OIRA Administrator has authority to "develop programs and prescribe regulations to improve the compilation, analysis, publication, and dissemination of statistical information by executive agencies." Nowhere do these guidance documents or the underlying authority for them convey enforcement authority outside the Executive Branch.[10]

Instead, *amicus* EFELDF respectfully submits that these laws create an intra-Executive-Branch issue. Moreover, on the subject of the census, the Census Act suggests that Commerce – not OMB – must decide these issues. 13 U.S.C. §4 ("Secretary shall perform the functions and duties imposed upon him by this title, may issue such rules and regulations as he deems necessary to carry out such functions and

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To count as a rulemaking, the agency must undertake an actual rulemaking.

[10] The only right that the PRA conveys to the public is the right to avoid certain penalties when an information-collecting agency fails to comply with PRA provisions regarding OMB control numbers for agency information-collection efforts. 44 U.S.C. §3512(a).

duties"). While the APA allows judicial review of Commerce's action, that review is narrow and does not empower a reviewing court to substitute its choices for the agency's choices. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). This Court should reject the district court's usurpation of duties that Congress assigned to Commerce.

2. Commerce's reasons for adding the citizenship question support that action.

Leaving temporarily aside Commerce's allegedly pretextual basis for reinstating a citizenship question, the district court did not make its case that Commerce acted arbitrarily or capriciously in selecting Option D over Option B.[11]

The district court faults Commerce for letting DOJ's VRA request drive Commerce's analysis, citing *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 & n.46 (D.C. Cir. 1987), for the twin propositions that agencies must consider alternatives and must provide reasoned explanations for rejecting them. Pet. App. 294a-295a. Although the district court ominously explains that "'failure of an agency to consider obvious alternatives has led uniformly to reversal,'" *id.* 295a (*quoting Brookings Mun. Tel. Co.*, 822 F.2d at 1169), Commerce obviously considered the four alternatives outlined in Secretary Ross's memorandum. *See* Pet. App. 551a-556a. That is enough to distinguish lower-court decisions in which an agency did not consider alternatives.

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[11] Section III.B.3, *infra*, addresses the pretext issue.

The district court rejects the need for better CVAP data for VRA enforcement on the theory that DOJ has never had such data since VRA's enactment. *Id.* 296a-297a. The district judge's objections do not defeat the value of having the CVAP data *prospectively* for purposes of this level of review. *See* Section II.A, *supra*. Instead, this narrow level of review "is not subject to courtroom fact-finding," *Beach Comm.*, 508 U.S. at 315, and plaintiffs must negate "the *theoretical* connection" between the purpose and the consequences of the government action. *Clover Leaf Creamery*, 449 U.S. at 463-64 (emphasis in original). Plaintiffs and the district judge come nowhere near making that showing.

The reasoned-decisionmaking analysis does not give reviewing courts the power to reject any agency course with which they disagree:

> The scope of review under the arbitrary and capricious standard is narrow. A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.

Elec. Power Supply Ass'n, 136 S.Ct. at 782 (internal quotations, alterations, and citations omitted). An agency action meets this narrow review if "the agency ... examined the relevant considerations and articulated a satisfactory explanation for its action." *Id.* The analysis that Commerce provided meets these criteria for the cited CVAP-VRA issue rationale.

In addition to the VRA issue, the record also indicates that Commerce identified citizenship data's value for research and policymaking. Pet. App. 34a (Report to Congress), 561a (Ross Memorandum).

These are entirely valid *additional* bases for addressing citizenship in the census. While *amicus* EFELDF is no advocate for U.S. courts' deciding U.S. legal issues based on foreign law, Secretary Ross explained that other major democracies (*e.g.*, the United Kingdom, Canada, Australia, France, Germany, and Mexico) all collect citizenship data in their census process and that the United Nations recommends that member countries ask citizenship-related questions in their census process. Pet. App. 561a. While not controlling as a matter of U.S. law, the widespread collection and use of such data by other countries makes it odd for the district court to suggest that the census should not address citizenship. In any event, the obvious value of citizenship data to policymaking provides another basis in the record to affirm Commerce's action.

In the context of the citizenship question's history and value, the 2010 census was the anomalous data point for *not* asking the question. A one-time absence provides no binding precedent from which Commerce now seeks to depart: "Arbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011). Instead, each census going forward in this era of expanding data availability and computing power will present its own questions of the technical feasibility of direct inquiry versus administrative records. *See* 13 U.S.C. §6(c); Pet. App. 554a-555a (discussing use of administrative records in the current context). Because the required records do not yet exist for a large section of the census population, Commerce was correct – and certainly *rational* – to select Option D.

3. The district court erred in vacating addition of the citizenship question as pretextual.

The district judge believes that the extra-record evidence establishes that Commerce intended to add a citizenship question long before DOJ's request for better VRA CVAP data. The district judge further believes – and held – that an agency decision under those circumstances would qualify as pretextual and therefore *per se* arbitrary and capricious. Pet. App. 245a-253a.[12] Regardless of whether the first belief is correct, the second belief and holding do not follow.

At the outset, the record suggests that Secretary Ross may have wanted to *consider* adding citizenship to the Census but felt that he needed a *new* reason, given that Commerce did not identify the issue on the §141(f)(1) report. *See* 13 U.S.C. §141(f)(3) (discussing additions based on "new circumstances"). But even if Secretary Ross had initially intended to adopt the citizenship question – for whatever reason, before his conferring with other governmental stakeholders – that would not invalidate his eventual decision to adopt the question for the reasons stated in the administrative record.

Neither the APA nor Article III gives judges the power that the district court claimed here. With the APA, Congress confined review to the record. 5 U.S.C. §706 (quoted, *supra*). More importantly, disregarding what an agency actually did by searching for an

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[12] The district court falsely claims that Commerce conceded that a pretextual rationale qualifies as arbitrary and capricious agency action, when Commerce merely indicated that that could be a factor in the APA analysis. Pet. App. 259a.

ulterior motivation would be "treat[ing an] Act as merely a ruse ... to evade constitutional safeguards." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 85 (1961). That, in turn, "would be indulging in a revisory power over enactments as they come from Congress – a power which the Framers of the Constitution withheld from this Court – if we so interpreted what Congress refused to do and what in fact Congress did." *Id.* The district court lacked a basis to try Commerce for perceived actions or motives: an administrative action stands or falls on the record.

In *Subversive Activities Control Board*, the initial bills would have targeted the Communist Party by name and effectively outlawed it. In response to constitutional questions raised against that approach, however, Congress amended the bill to target certain activities, *id.*, which the Court upheld without regard to the alleged constitutional defects of the bills as first envisioned by the drafters. During the Cold War, when presented with the argument that regulating the Communist Party one way would violate the Constitution, the Government changed the bill's focus to achieve a desired end lawfully. The Court simply did not inquire whether "the Act is only an instrument serving to abolish the Communist Party by indirection" because the "true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible." *Id.* at 84-86. Similarly, here, Commerce has every right to conduct the census to gather information that it has gathered for most of this Nation's history, without regard to whatever

Plaintiffs or the district judge might think motivated the Secretary. It is enough that the proposed census question is both lawful and supported by the record before the agency.

CONCLUSION

This district court's judgment should be vacated, and this Court should remand these consolidated actions with instructions to dismiss them.

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